No. 82-1616

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICUS CURIAE.
IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICUS CURIAE.

United States Forgecraft Corporation [hereinafter "Amicus"] files this brief pursuant to Rule 36 of the Rules of the Supreme Court of the United States. In the trial below, Amicus serves as a codefendant with respondents Weber Aircraft Corporation and Mills Manufacturing Corporation. This brief supports their contentions. Additionally, Amicus hopes to assist this Court in resolving the conflicts in the appellate decisions that address Exemption 5 to the Freedom of Information Act, and military aircrash investigations. Critical nuances in alleged privileges and exemptions under the Freedom of Information Act require detailed analysis. The effectiveness and fairness of future military aircrash litigation depend on the outcome. In addition, Amicus believes that the disclosure of facts gathered during government investigations is a public right worthy of careful protection.

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SUMMARY OF ARGUMENT.

A plain reading shows that Exemption 5 to the Freedom of Information Act cannot bar disclosure unless the information sought falls within a recognized civil discovery privilege. The witness statements, in this case, were never privileged.

The Court of Appeals for the District of Columbia expressly limited the *Machin* privilege to statements made by *civilian* personnel. *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963). The court realized that private parties are not required to testify before military safety investigation boards. In addition, the prospective liability of their employers and their own job security could be adversely affected by their testimony. In that environment, the promise of confidentiality and the corresponding privilege recognized in *Machin* have merit.

On the other hand, military personnel are duty-bound to testify before safety investigation boards. *See generally* A.F.

Reg. 127-4, para. 1 (Jan. 1, 1973). They also know that, by regulation, their commander and his supervisors are quickly notified of any admissions bearing on their own fault, or that of friends. *See id.* at paras. 13-16. In such an environment, a promise of confidentiality has little, if any, purpose. A privilege based on that promise is even less necessary. The holding in *Machin* is consistent with this reality.

The Court of Appeals for the Eighth Circuit, however, essentially ignored this important distinction in *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975). In a clearer manner, the Court of Appeals for the Fifth Circuit candidly admitted that it failed to understand the distinction made in *Machin* between civilian statements and those of military personnel. *Cooper v. Department of the Navy*, 558 F.2d 274, 277-78 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484, *cert. denied*, 444 U.S. 926 (1979). As a consequence, the Fifth Circuit followed the Eighth and extended the *Machin* privilege to statements made by military personnel. *Id.*

Amicus urges this Court to reject that ill-founded extension, and hold, in accordance with the Court of Appeals for the District of Columbia, that the *Machin* privilege does not apply to statements made by service personnel during military aircraft accident investigations.

In addition, while arguing that a privilege exists, petitioners emphasize that the statements at issue "were obtained under a pledge of confidentiality." Brief for Petitioner at 24. A bare promise of confidentiality by the government, however, cannot create a civil discovery privilege. Although the Air Force can limit its own internal use of witness statements, it exceeds its authority in attempting to use its own regulations and promises of confidentiality to restrict civilian access to unclassified government infor-

mation. *See*, e.g., A.F. Reg. 127-4, para. 19a(3) (Jan. 1, 1973). Amicus asks this Court to firmly reject that abuse of authority.

On the other hand, even if statements made by military personnel to safety investigators are deemed to be privileged, Exemption 5 should not apply in this case. In keeping with congressional intent and past judicial interpretations, the exemptions to the Freedom of Information Act should be narrowly construed. Exemption 5 was never designed to bar access to *factual data* gathered by government investigators. That is especially true where, as here, a bar to disclosure would adversely affect the rights and liabilities of private citizens. Amicus firmly believes that this Court should continue to hold government investigations subject to close public scrutiny.

If, however, the Court determines that a privilege and exemption should apply to the witness statements in this case, a waiver has occurred. At a deposition in 1976, certain of these statements were released by Air Force employees to the counsel present at that time. The Air Force subsequently confiscated the documents. To now suppress the statements is manifestly unfair.

In any event, disclosure of the particular statements in this case is required to satisfy the truth-seeking function of our judicial system. By regulation, the Air Force safety investigation is conducted immediately after an aircraft accident. Witnesses are interrogated before they have an opportunity to forget or fabricate the details. In the present case, timely investigation disclosed the truth.

The documents that were released at the 1976 deposition indicate that Hoover (the pilot-plaintiff) and Dickson (the Air Force parachute rigger) drastically altered their testimony between the time of the safety investigation and their

subsequent depositions. Their changing testimony directly concerns the nature and cause of the accident, tends to reveal the truth, and bears upon the central issues of rights and liabilities in the underlying case.

In addition, the events leading to Hoover's injury happened more than ten years ago. The evidence is decidedly stale. This staleness and the changing testimony by each of the key figures in the underlying litigation make an effective and fair trial unlikely. The fairness of trial, in particular, hinges dramatically on using the most accurate evidence available. That evidence, which is most likely to contain the truth, exists in the witness statements that the government would suppress. Amicus urges this Court to prevent that suppression of truth.

ARGUMENT.

I.

EXEMPTION 5 TO THE FREEDOM OF INFORMATION ACT IS TRIGGERED BY A PRIVILEGE; NO PRIVILEGE EXISTS IN THIS CASE AND, THUS, THE WITNESS STATEMENTS MUST BE DISCLOSED.

A. Exemption 5 Cannot Bar Disclosure Without an Underlying Privilege.

The Congressional philosophy leading to the Freedom of Information Act [hereinafter "FOIA"] requires full disclosure unless information is exempted under clearly delineated statutory language. S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Exemption 5 specifically excludes: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This Court held that "it is reasonable to construe Exemption 5 to exempt those documents, and *only those documents*, normally privileged in the civil discovery context." *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added).

In addition, Congress expressly mandated that the FOIA "does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated*." 5 U.S.C. § 552(c) (emphasis added). As a direct result, Exemption 5 cannot bar disclosure unless the information sought is subject to a recognized civil discovery privilege.

B. The *Machin* Privilege Is Limited to Private Parties and Does Not Apply in This Case.

"[A] claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution." *Federal Open Market Committee*

v. Merrill, 443 U.S. 340, 355 (1979). Petitioner alleges that the Court of Appeals for the District of Columbia in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) established a civil discovery privilege for all confidential witness statements made during military safety investigations. Brief for Petitioner at 5 n.10. Such is not the case.

The Court of Appeals for the District of Columbia carefully delineated the holding in *Machin*. The court stated: "Insofar, therefore, as the subpoena sought to obtain *testimony of private parties* who participated in the investigation, we agree with the District Court that such information in the hands of the Government is privileged." *Machin, supra*, at 339 (emphasis added). The court further held, however, that statements and factual findings by Air Force personnel who examined the wreckage in that case were *not* necessarily privileged. *Id.* at 340. The court explained that those "portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations." *Id.* (footnote omitted).

In its supplemental opinion, the court held that: "If the [Air Force] mechanics expressed any 'opinions' or 'conclusions' as to possible defects in the propellors or propellor governors that might have been due to the negligence of United Aircraft, we do not consider that such expressions would come within the privileges enunciated in our opinion." *Id.* at 341 (supplemental opinion). As a result, the court ordered disclosure of the factual findings, statements, opinions and conclusions of Air Force personnel concerning the cause of the aircraft accident. *Id.*

The Court of Appeals for the Fifth Circuit, however, applied the *Machin* privilege to statements made by military personnel during an aircrash investigation. *Cooper v. Department of the Navy of the United States*, 558 F.2d 274,

278 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484, *cert. denied*, 444 U.S. 926 (1979). The court recognized that the Court of Appeals for the District of Columbia expressly limited the *Machin* privilege to statements made by private parties as opposed to service personnel, but was "unable to follow the reasoning upon which the distinction rests." *Id.* at 277. The Fifth Circuit elected instead to follow the Eighth Circuit decision in *Brockway v. Department of the Air Force*, 518 F.2d 1184, 1192 (1975) where the *Machin* distinction between statements by military and civilian personnel was essentially ignored. *Cooper, supra*, at 277-78.

Basing the privilege on the source of the statement, however, is justified by a well-founded distinction. As the Court of Appeals for the Fifth Circuit emphasized, private parties such as civilian aerospace employees naturally fear subsequent suit against their employer due to information divulged by them during aircraft safety investigations. *Id.* at 277. In addition, their income and promotion prospects hinge on any words they might volunteer to the Air Force Investigation Board. The integrity and reputation of their employer's product is normally at stake.

As a result, the promise of confidentiality is arguably needed in convincing civilians to make statements to Air Force investigators. The same may not be said of service personnel. Military personnel are duty-bound to report to the Air Force Investigation Board. *See generally* A.F. Reg. 127-4, para. 1 (Jan. 1, 1973). Civilians have a choice. That *choice* is the source of the well-founded distinction in *Machin* as evidenced by the court's reliance on *Boeing Airplane Company v. Coggeshall*, 280 F.2d 654, 660-61 (D.C. Cir. 1960) (emphasizing judicial concern with situations "where the Government depends on volunteered information from private citizens"). *Machin v. Zuckert, supra*, at 340. Thus, the purpose of the promise of confidentiality and its cor-

responding privilege is to induce and encourage voluntary appearances by civilian witnesses who otherwise might not choose to offer their testimony. That purpose does not exist as to military personnel.

In addition, a privilege based on a "promise of confidentiality" to service personnel is unrealistic. The military person knows he has a duty to make statements to the Air Force safety investigators. He also knows that the same investigators report directly to his commanders. A.F. Reg. 127-4, paras. 9 and 13-16 (Jan. 1, 1973). His every admission concerning the aircrash receives immediate attention at the highest levels within the Air Force. A.F. Reg. 127-4, paras. 2 and 13-16 (Jan. 1, 1973).

It is naive to believe that a "promise of confidentiality" would encourage a service person to divulge information potentially dangerous to his career or that a friend. As stated by the Court of Appeals for the Fifth Circuit: "[S]ervice people are human, too: They fear disciplinary action, work and hope for promotion, possess loyalities and ties of friendship to people and organizations, [and] dislike speculating to the derogation of the dead." *Brockway, supra*, at 277.

The military person knows full well that, by regulation, his commanders will be informed of his admissions. A.F. Reg. 127-4, paras. 13-16 (Jan. 1, 1973). A promise of confidentiality in that environment rings hollow.

Just as clearly, a service person, unlike a private citizen, needs no "promise of confidentiality" to divulge information that is not potentially dangerous to his career or that of a friend. That is his duty. When military personnel volunteer information during an aircraft accident investigation, it is out of that sense of duty, *not* a "promise of confidentiality."

For these reasons, Amicus urges this Court to hold, in accordance with the Court of Appeals for the District of

Columbia, that the *Machin* privilege does not apply to statements made by service personnel during military aircrash investigations.

C. A Promise of Confidentiality Alone Cannot Create a Privilege.

In arguing that a privilege exists, petitioners emphasize that the statements at issue "were obtained under a pledge of confidentiality." Brief for Petitioner at 24. The courts, however, have repeatedly rejected the proposition that promises of confidentiality give rise to a privilege, or a corresponding exemption under the Freedom of Information Act. *Petkas v. Staats*, 501 F.2d 887 (D.C. Cir. 1974); *Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973); *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969).

In *Petkas v. Staats*, *supra*, the Court of Appeals for the District of Columbia held that the government's promise of confidentiality to defense contractors regarding their cost accounting methods was not enough to defeat the public right to disclosure under the Freedom of Information Act. *Id.* at 889 (discussing Exemption 4). The Court of Appeals for the Fourth Circuit held in *Robles v. Environmental Protection Agency*, *supra*, that government promises of confidentiality made while acquiring information cannot defeat disclosure. *Id.* at 846 (Exemption 6). In *Ackerly v. Ley*, *supra*, the Court of Appeals for the District of Columbia emphasized that: "It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, in and of themselves, override the [Freedom of Information] Act." *Id.* at 1340 n.3.

As mentioned earlier, the Department of the Air Force has obvious authority to promise confidentiality and restrict the use of gathered information within the Air Force itself. A.F. Reg. 127-4, para. 19a(1) (Jan. 1, 1973). The internal practices and policies of the Air Force, however, are not at issue in this case. The fulcrum of the test as to whether Exemption 5 applies is "discovery practices as regulated by the courts, not discovery as it is practiced by the government." *Consumer Union of the United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 804 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). Clearly, the Air Force ventures beyond its authority when attempting to use its own regulations and promises of confidentiality to restrict civilian access to unclassified government information. *See* A.F. Reg. 127-4, para. 19a(3) (Jan. 1, 1973). As stated by the court in *Ditlow v. Volpe*, 362 F. Supp. 1321 (D.D.C. 1973), *rev'd on other grounds*, 494 F.2d 1073 (D.C. Cir. 1974): "The mere promise of confidentiality cannot create an exemption from the statute under which the agency is required to disclose the information. Such an approach would enable the agency to render meaningless the statutory scheme." *Id.* at 1324 n.4 (citations omitted).

The Air Force has no authority whatsoever to use unilateral promises of confidentiality to restrict civilian access to information. A civil discovery privilege cannot be created in that manner; naked promises should not defeat the public's right to disclosure. *See Getman v. National Labor Relations Board*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Ditlow v. Volpe, supra*, at 1324 n.4; *Legal Aid Society v. Schulz*, 349 F. Supp. 771, 776 (N.D. Cal. 1972).

D. Without a Privilege, the Witness Statements Must Be Disclosed Pursuant to the Freedom of Information Act.

Exemption 5 cannot apply because there is no recognized privilege in this case to invoke that exemption. In addition, no other exemptions apply. As stated by petitioners:

> "[S]tatements such as those at issue here are not classified documents (Exemption 1), do not relate solely to agency personnel rules or practices (Exemption 2), are not specifically exempted from disclosure by any other statute (Exemption 3), do not contain confidential or privileged trade secrets or commercial or financial information (Exemption 4), do not contain information 'the disclosure of which would constitute a clearly unwarranted invasion of personal privacy' (Exemption 6), are not 'investigatory records compiled for law enforcement purposes' (Exemption 7), are not contained in or related to reports prepared by, on behalf, or for the use of an agency that regulates or supervises financial institutions (Exemption 8), and do not contain 'geological and geophysical information and data . . . concerning wells' (Exemption 9)." Brief For Petitioner at 30.

In establishing the FOIA, Congress required that "all materials of the Government are to be made available to the public . . . unless explicitly allowed to be kept secret by one of the exemptions." S.Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); *see also* H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966). In the absence of an exemption, disclosure is mandated. *See* 5 U.S.C. § 552(c). In this case, no exemptions apply; therefore, the Freedom of Information Act requires that the witness statements at issue be disclosed.

As the Court of Appeals for the Ninth Circuit concluded: "To decide that the FOIA authorizes the government to

withhold the witness statements at issue, we would have to amend the FOIA judicially. This we are unwilling to do." *Weber Aircraft Corp. v. United States*, 688 F.2d 638, 644 (1982). Amicus asks this Court to affirm that decision.

II.

EVEN IF A PRIVILEGE IS FOUND, EXEMPTION 5 SHOULD NOT APPLY IN THIS CASE.

A. Congress Never Intended Exemption 5 to Bar Disclosure of Facts Gathered During a Government Investigation.

The basic policy of the FOIA favors disclosure. *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). As a result, the FOIA should be broadly construed in favor of disclosure, *id.* at 366, and, unless the information falls squarely within one of the statutory exemptions, it must be disclosed on demand to any member of the general public. *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978). Also, the statutory exemptions should be narrowly construed with all doubts resolved in favor of disclosure. *Department of the Air Force v. Rose, supra*, at 361-62; *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79-80 (1973), and the federal agency has the burden of justifying nondisclosure. 5 U.S.C. § 552(a)(4)(B). In particular, the Senate emphasized that the drafting committee "attempted to delimit [Exemption 5] as narrowly as consistent with efficient Government operations." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

As stated by the court in *Bristol-Meyers Co. v. Federal Trade Commission*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970):

> "The statute exempts 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation

with the agency.' This provision encourages the free exchange of ideas among government policy makers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum." *Id.* at 939 (citations omitted).

In the present case, the Air Force wants to bar the disclosure of facts contained in witness statements by attempting to force fit the statements into Exemption 5. The government must not be allowed to bury facts under the guise of that exemption.

B. The Courts and Congress Agree That Government Investigations Should Be Open to Disclosure.

Courts have generally agreed that Exemption 5 should not apply to factual material gathered during government investigations. *See, e.g., Environmental Protection Agency v. Mink, supra.* This principle should apply with particular force where, as here, nondisclosure directly affects the rights and liabilities of private citizens. As this Court explained in *Environmental Protection Agency v. Mink, supra*, at 89: "[V]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other."

The Court of Appeals for the District of Columbia has stated that Exemption 5 covers: "Internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, *but not purely factual or investigatory reports.*" *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (emphasis added). *See also Title Guarantee Co. v. National Labor Relations Board*, 534 F.2d 484, 492 n.15 (2d Cir.), *cert.*

denied, 429 U.S. 834 (1976); *Tennessean Newspapers, Inc. v. Federal Housing Authority*, 464 F.2d 657, 660 (6th Cir. 1972); *Local 30, United States, Tile and Composition Roofers v. National Labor Relations Board*, 408 F. Supp. 520, 527 (E.D. Pa. 1976); *M.A. Schapiro & Co. v. Securities & Exchange Commission*, 339 F. Supp. 467, 470 (D.D.C. 1972); *Consumer Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

The witness statements at issue in this case are part of a government investigatory report, and contain critical facts. The weight of case law clearly indicates that disclosure of such data should not be barred by Exemption 5. In addition, Congress considered an express exemption for investigatory reports, and carefully limited that exclusion to "investigatory records compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Had Congress intended a more widespread exclusion for reports based on government investigations, one can reasonably assume they would have expressly indicated that intent in the FOIA. They did not. In accordance with past judicial and legislative opinions, Amicus urges this Court to continue to hold government investigations subject to close public scrutiny. Correspondingly, the witness statements in this case should be disclosed.

III.

IF A PRIVILEGE AND AN EXEMPTION ARE FOUND TO APPLY, THE RELEASE OF DOCUMENTS BY THE AIR FORCE CONSTITUTED A WAIVER.

The deposition of John F. Findley, a United States Air Force employee, was taken in the underlying case at Kelly Air Force Base, Texas, on June 9, 1976. During testimony, Mr. Findley produced a number of documents pursuant to valid subpoena. The documents contained excerpts from Hoover's statement to the Accident Investigation Board, and

the official determination that military personnel error caused Hoover's injuries. Those documents were reviewed by the counsel present at that deposition. Thereafter, the Air Force confiscated the documents alleging that they were privileged.

In *Cooper v. Department of the Navy*, 594 F.2d 484 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979) (*Cooper II*), the court found a waiver and emphasized that the Navy distributed the Aircraft Accident Report in that case to unauthorized personnel including the aircraft manufacturer. *Id.* at 486. The Court of Appeals for the Fifth Circuit quoted the trial court with approval:

> "Whether it results from negligence, or from voluntary and knowing acts on the part of Navy personnel, the fact remains that the release of these reports to persons other than those authorized by Navy regulations can be traced directly to the Department of the Navy . . . . Thus, the Navy did not adhere to its own regulations pertaining to the dissemination of information contained in these [Aircraft Accident Reports] and should now be held to have waived the exemption which it might have had under the Freedom of Information Act insofar as this particular report is concerned. The Navy Department simply cannot permit these reports to be available to some people, who are not authorized under its own regulations . . . and then deny the same privilege to others." *Id.* at 485-86. *Accord, Shermco Industries v. Secretary of the Air Force*, 613 F.2d 1314, 1320 (5th Cir. 1980); *Education Instruction, Inc. v. Department of Housing and Urban Development*, 471 F. Supp. 1074, 1081 (D. Mass. 1979), *aff'd*, 649 F.2d 4 (1st Cir. 1981). *But cf. Medina-Hincapie v. Department of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (holding that a U.S. State Department "leak" does not waive Exemption 3).

If this Court decides that a privilege and exemption should apply in this case, the release of documents at Findley's deposition constituted a waiver. In fairness, the factual data contained in the released documents should be fully and accurately disclosed to all parties and counsel in this litigation.

IV.

IN ANY EVENT, DISCLOSURE IS REQUIRED TO SATISFY THE TRUTH-SEEKING FUNCTION OF THE COURT.

As discussed earlier, Air Force Regulation 127-4 requires that military safety investigators report directly to commanders at the various Air Force levels. A.F. Reg. 127-4, paras. 9 and 13-16 (Jan. 1, 1973). In addition, Air Force personnel are duty-bound to know their regulations. As a result, those involved in aircrash investigations are quite aware of these mandated communications between command levels. In fact, by regulation, those accused of fault are given an opportunity to rebut the findings of the Accident Investigation Board. A.F. Reg. 127-4, para. 23 (Jan. 1, 1973). Reports and rebuttals are forwarded through channels to major command headquarters. *Id.* It is submitted therefore that promises of confidentiality do not affect decisions by military personnel as to the content of their testimony. Service personnel realize that their reputation and career, and that of their friends, are potentially at stake, and testify accordingly.

The Air Force safety investigation is, moreover, quite comprehensive. Most importantly, the interrogation of witnesses quickly follows an aircraft accident so as to minimize the opportunity for personnel to forget or fabricate details. *See*, e.g., A.F. Reg. 127-4, paras. 5 and 6 (Jan. 1, 1973). As a result, the petitioner in this case errs in concluding that disclosure of the witness statements "made to military safety investigators is unlikely to promote open government,

an informed citizenry, or any other beneficial purpose." Brief for Petitioner at 33. Those statements are the freshest and most accurate accounts of the aircraft accident available.

In contrast, the key depositions in the underlying case took place three years after the accident. In addition, the events leading to the plaintiff's injury occurred more than ten years ago. The testimony at trial will suffer accordingly. As a result, disclosure of the statements at issue, despite petitioner's contentions, will clearly promote ascertaining the truth, prevent government abrogation of its responsibilities, and inform private citizens of their rights and liabilities with respect to the underlying aircraft accident.

This Court has noted that "[d]iscovery for litigation purposes is not an *expressly* indicated purpose of the [Freedom of Information] Act." *The Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 25 (1974) (emphasis added). Justice Douglas pointed out in dissent, however, that the FOIA:

> "had as one of its purposes 'discovery for litigation purposes.' Congress was concerned not only with the press and the general public when it lifted the veil of secrecy surrounding federal agencies but also with litigants. According to the Senate Report, 'the new FOIA was designed in part 'to prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it.' S.Rep. No. 813, 89th Cong. 1st Sess. 7." *The Renegotiation Board v. Bannercraft Clothing Co., supra,* at 30 (Douglas, J., dissenting).

In any event, this Court has repeatedly held that "[t]he basic purpose of a trial is the determination of truth." *Tehan v. United States*, 382 U.S. 406, 460, *reh. denied*, 383 U.S.

931 (1966). *Accord, United States v. Havens*, 446 U.S. 620, 626, *reh. denied*, 448 U.S. 911 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

In the current case, there are clear indications that witnesses Hoover (the pilot-plaintiff) and Dickson (the Air Force parachute rigger) testified to facts during the Air Force Safety Investigation that conflict directly with their subsequent testimony in other forums. Their earlier statements concerned the nature and cause of the accident, and tend to reveal the truth directly bearing on the rights and liabilities in this litigation.

A key issue in the related case below involves a missing speed connector link that Amicus allegedly manufactured. The link was a connecting element in the parachute apparatus that purportedly failed during Hoover's ejection. Following his parachute landing, the right rear connector link was missing from Hoover's equipment and was never found. Whether Airman Dickson properly replaced the link during his modification and re-pack of Hoover's parachute remains a critical question in the underlying litigation. As a direct result, the liability of Amicus in this case may hinge completely on the truthful testimony of Airman Dickson. That testimony exists in the records of the Air Force Safety Investigation Board.

Also, Hoover's deposition testimony about events leading to his injury directly conflicts with that given to the Safety Investigation Board (as reflected in the documents temporarily released by the Air Force). At his deposition, Hoover stated that following ejection, he executed a normal parachute landing fall upon impacting the ground. To the Air Force safety investigators, however, Hoover admitted that he raised his knees in a crouch prior to impact and landed on his survival kit which had failed to automatically deploy.

The truth of the matter bears on more than Hoover's credibility. The degree and proportionate share of liability among the individual defendants in this case turns directly on the truthful account of events prior to injury. How did Hoover's equipment function, or not function? Which items of equipment malfunctioned and how? What extraordinary steps was Hoover forced to take due to certain malfunctions as opposed to others? These are questions that can only be fairly answered with access to Hoover's fresh, unadulterated statements made to the Air Force safety investigators.

Finally, Amicus must emphasize that the events leading to Hoover's injury happened more than ten years ago. Almost certainly, many of the military and civilian personnel involved have retired, moved elsewhere, or, perhaps, even died. Written records have been scattered, misplaced and destroyed. The evidence in this case is decidedly stale. In such a situation, conducting a fair and effective trial hinges dramatically on using the most accurate evidence available. That evidence, and the truth are found in the witness statements that the government wants to suppress. Amicus urges this Court to prevent that suppression of truth.

CONCLUSION.

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated: December 1, 1983.

Respectfully submitted,

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APPENDIX.

Air Force Regulation 127-4, January 1, 1973 (in pertinent part):

1. *Air Force Policy on Investigation and Reporting* . . . . Each major commander will:
   a. Investigate and report each accident and incident.
   b. Maintain a followup system to make sure that all corrective action is taken.
   c. Require a personal report from the commander of each subordinate unit having an accident that causes death or serious casualities [*sic*] or extensive property damage. Included in this category are accidents that:
      (1) Arouse widespread public interest;
      (2) Cause an unfavorable public reaction toward the Air Force; or
      (3) Result in lawsuits against the Government.

   This personal report is in addition to all others required by this regulation. The frequency and severity of accidents will determine the extent of the personal contact.
   d. Accomplish courtesy reporting as outlined in AFM 127-2.

2. *Administration of U.S.A.F. Accident/Incident Investigation and Reporting Program.* The Deputy Inspector General for Inspection and Safety, HQ USAF, through the Directors of Aerospace and Nuclear Safety, administers the USAF Accident and Incident Investigation and Reporting Program. Within his area of responsibility, each director will:
   a. Administer this regulation.
   b. Analyze and evaluate each accident/incident and make sure it is properly reported and investigated.

c. Initiate procedures, develop forms, and prescribe the nature and extent of investigations and reports.

d. Keep on file the original copy of each USAF Accident/Incident Report and prepare analyses and statistical data for use in accident prevention.

* * * * *

5. *First Military Personnel at Scene of Mishap.* The first military person reaching the scene, if the situation requires, will:

a. Obtain necessary medical services or identification assistance, as required. (For mortuary services, see AFM 143-1.)

b. Report by telephone or the most expeditious means all known facts to the nearest Air Force installation.

c. Obtain names and addresses of all available witnesses (including the rank, SSAN, organization, and station of all military personnel) whose testimony may aid the investigation.

d. Until relieved or otherwise instructed by competent authority, do what is necessary to make sure the wreckage is not moved or tampered with in any way.

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6. *Responsibilities of the Nearest Air Force Base Commander.* (Also consult AFM 335-1G.) As soon as he learns of an accident/incident on or near his base, the commander is responsible for:

a. Emergency First Aid and Safety Action. He will:

(1) Furnish necessary firefighting, rescue, and medical facilities and other disaster control activities, as required;

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(6) Conduct investigations as required by AFM 112-1.

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9. *Who Is Responsible for Investigating an Accident or Incident:*

a. Investigating Major Commander. The major commander, with command responsibility for the unit that had the mishap is responsible for insuring that the accident/incident is investigated . . . . The responsible major commander may authorize a deviation from c below within his command, to expedite and insure a comprehensive and professional investigation. When the accident/incident is in a locality that prevents a prompt investigation by the responsible major commander, he may request another major commander to appoint an investigating commander who is nearer the scene of the occurrence; such an appointment will take place only with the mutual consent of the two major commanders concerned.

b. Investigating Commander. The commander who appoints the investigating board or officer or under whose jurisdiction the investigation is actually conducted is the investigating commander. He will:

(1) Decide whether the investigation is to be conducted by one of his staff investigating officers or by an investigating board.

(2) Insure that crash, preliminary, supplemental, and progress reports are submitted.

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(4) Insure that all accident factors are investigated thoroughly and obtain technical assistance as

required . . . . He will seek the advice of his staff judge advocate on legal questions and will consult The Judge Advocate General, HQ USAF, if necessary; see paragraph 24.

(5) Review the investigation proceedings, findings, recommendations, and actions; evaluate the formal accident/incident report to insure that it fulfills the purpose, intent, and requirements of the USAF accident prevention program.

(6) Forward the formal accident/incident report as required by this regulation (see section D). If more information is discovered after the formal report has been submitted, he will send it by letter to the same addressees. (This letter should include the names of persons whose subsequent deaths were the result of the accident.)

(7) Take corrective action required to prevent recurrence of the mishap. (Describe action taken in the correspondence forwarding the report.)

(8) Authorize the release of information to news media, relatives, and other agencies specified in paragraph 20.

c. How to Decide Who Is the Investigating Commander. Formal responsibility is determined as follows:

(1) If the accident involves aircraft, missiles or nuclear materiels, the commander of the next echelon above the unit that had the accident normally is the investigating commander. However, in no instance will the investigating commander be lower than wing or equivalent

organizational level.

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(3) If an aircraft mishap involves operators of two or more bases/organizations, their respective commanders will mutually determine which will be the investigating commander.

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13. *Brief Discussion of the Reporting System.*

a. Types of Reports. To insure that all interested activities are notified and kept abreast of developments of an investigation, the reports below are required as specified in attachments 3 through 7 for each type of accident and incident.

(1) Telephone Report. When a serious accident or incident occurs, report immediately by telephone to the AF Operation Center. This is referred to as OPREP-3 report (see JCS Pub 6, Vol II and V).

(2) Teletype Report (Crash, Preliminary, Supplemental and Progress). Submit these reports to notify all appropriate persons and officers that a mishap has occurred.

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(4) Formal Report (See AFM 127-2). This report is the detailed record of the investigation and is submitted on the AF Forms 711 series. Attachment 9 specifies the forms and substantiating documents to submit for a formal report. This report is sent to the appropriate addressees (listed in attachments 3 through 7) who review the report for command and corrective actions.

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14. *Who Will Review the Formal Report.* Since the causes may include weather services and facilities, materiel failure or suspected design deficiency, human error, and other factors, the report must be reviewed by the responsible commands, action agencies, and personnel. The following will review each report:
    a. Each organization with command responsibility.
    b. Each command with technical responsibility.
    c. Each person who has been named responsible for the accident/incident, except persons involved in ground/explosives mishaps (see paragraph 23 for rebuttal procedures).

15. *Forwarding Reports.* The accident investigating board president or the investigating officer will send copies of these reports to the addressees (listed in attachments 3 through 7) within the assigned deadline. He will:
    a. Send the original (first copy of multilith not used) aircraft, missile or explosives accident report or formal incident report with a letter of trasmittal to the Dir of Aerospace Safety; send nuclear accident/incident reports to the Dir of Nuclear Safety.

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16. *Review of Formal Reports by Commands and Appropriate Action.*
    a. Each headquarters to which aircraft, missile, major command, explosives or nuclear reports are forwarded for review (see attachments 3 through 7) will indorse them to the next higher headquarters or return them to the next lower echelon for additional information or investigation, within 12 workdays of their receipt.

b. A commander who cannot meet this 12-day deadline will notify the appropriate intermediate and major commands and the Dir of Aerosp Safety (or Dir of Nuclear Safety, if nuclear) of the delay. He will explain the reason for the delay and tell when he expects to forward his indorsement.

c. Each indorsing commander will state his concurrence or nonconcurrence with the report findings and with the corrective action taken or recommended by each subordinate indorsing commander.

d. The major commander will retain the report (except for major ground reports) and, within the 12-day deadline, indorse the transmittal letter (AF Form 711a for major ground reports) to Dir of Aerosp Safety and/or Dir of Nuclear Safety stating:

(1) His concurrence or nonconcurrence with all recommendations resulting from the investigation, including those of each subordinate indorsing commander; and

(2) The corrective action taken within the major command, including action to forward the report to the appropriate agency for corrective action.

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19. *Purpose and Limitations on the Use of Accident and Incident Reports*. This paragraph does not apply to ground or explosives accident/incident reports.

a. Privileged Reports. These reports and their attachments are prepared by, for, or at the direction of The Inspector General, USAF, and his deputies, directors and assistants and are, therefore, privileged documents. (The disposition of privileged documents will be as directed by AFM 12-50 and

AFR 205-1.) When destruction is authorized for unclassified reports, tear or otherwise deface documents in a manner that offers positive assurance against further access to the information.

(1) Reports and investigations of the USAF accidents and incidents made under this regulation will be used only within the USAF to determine all factors contributing to the mishap for the sole purpose of taking corrective action in the interest of accident prevention (see paragraph 20).

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(3) These Reports and their attachments will not be released to the Department of Justice, any United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. These prohibitions include any action by or against the United States . . . . This prohibition includes crash, preliminary, supplementary, and progress reports, formal reports on AF Form 711, and special accident/incident investigative reports prepared by the Dir of Aerospace Safety.

(4) Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like non-

personal evidence may be release [*sic*] as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused.

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23. *Notifying Persons Found Responsible for an Aircraft, Missile, or Nuclear Accident/Incident:*

a. Military and Civilian Personnel Under Air Force Jurisdiction. When the investigating board/officer or a reviewing commander (see note at end of para 16a(4)) names a person whose action or inaction it finds to have been a cause of the mishap, that person will be given an opportunity to submit a statement of rebuttal, or a statement declining rebuttal. Further, the person must be advised that paragraph 12c applies to statement of rebuttal and that the statement will become an attachment to the accident/incident report. If the person found responsible is:

(1) Attached/assigned to the organization that had the mishap, the investigating board/officer will offer him an opportunity to review the report and submit his rebuttal statement as above.

(2) Attached/assigned to another major command (other than the one that had the mishap), the investigating board/officer will send a copy

of the report to the person's immediate commander with a letter asking that commander to:

(a) Notify the person and give him an opportunity to review the report.

(b) Obtain the above rebuttal statement and return it (with a specified number of copies) to the investigating board/officer.

(c) Forward one copy of the rebuttal statement with the report through channels to the major commander. (He will detach the report and indorse the rebuttal statement to the Dir of Aerospace/Nuclear Safety as appropriate, indicating any appropriate corrective action which has been taken.)